Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

CARL A. MAAS, ET AL.,

Petitioners,

vs.

TEXAS AIR CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a parent corporation's obligations under a contract guaranteeing its subsidiary's performance of a collective bargaining agreement are excused by the subsidiary's rejection of that agreement in the course of the subsidiary's bankruptcy?

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OPINIONS BELOW

This petition seeks review of the unpublished judgment and opinion of the Court of Appeals for the First District of Texas, which affirmed the judgment of the 80th District Court of Harris County, Texas. Petitioners sought damages on a contract claim against respondent, and the state court of appeals affirmed summary judgment for respondent based on its interpretation of 11 U.S.C. §365(a) (permitting the debtor to reject executory contracts in bankruptcy proceedings). The Supreme Court of Texas denied petitioner's application for writ of error,

which sought discretionary review of the decision of the Court of Appeals.

JURISDICTION

This court has jurisdiction to review the opinion and judgment of the Texas court of appeals pursuant to 28 U.S.C. §1257. The opinion and judgment of the court of appeals were issued on March 14, 1991. The court of appeals overruled petitioners' motion for rehearing on April 25, 1991. Petitioners filed their application for writ of error with the Supreme Court of Texas on May 24, 1991. On June 8, 1992, the Delaware bankruptcy court handling Texas Air Corporation's Chapter 11 bankruptcy proceedings granted petitioners limited relief from the automatic stay: Petitioners were allowed to go forward with the case in the Texas Supreme Court and "the appropriate lower appellate court, on remand, if applicable". The Supreme Court of Texas denied the application for writ of error on November 4, 1992, and it overruled petitioners' motion for rehearing on December 9, 1992. The prior modification of the bankruptcy automatic stay did not permit petitioners to seek review in this Court; petitioners had to file a request for further modification of the stay. On March 26, 1993, the bankruptcy court granted a further modification of the automatic stay to permit this application for writ of certiorari. The existence of the automatic bankruptcy stay extended the time for filing this petition until April 25, 1993, or 30 days after termination of the automatic stay. 11 U.S.C. §108(c). This petition is filed within the 30 day period and is therefore timely.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §365(a) states:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. §365(g) provides:

> Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease. . . .

STATEMENT OF THE CASE

This is a breach of contract case in which the Court of Appeals sustained a defense based on its interpretation of federal bankruptcy law.

In 1982 the Air Line Pilot Association, International ("ALPA") entered into a modification of its collective bargaining agreement (the "Basic Agreement") with Continental Airlines, Inc. ("CAL" or "Continental"). In essence, the pilots conceded over $100 million in wage and benefits rights in exchange for job security assurances: CAL agreed that "[a]ll present or future flying performed in and for the service of Continental [was] to be performed by pilots on the current Continental Pilot Seniority List."

However, ensuring performance of the Basic Agreement was a critical issue, and the Continental pilots were not satisfied that the CAL contract would adequately

protect them. Therefore, at the same time the 1982 agreement with CAL was executed, the pilots sought and obtained, acting through ALPA, an agreement from Texas Air Corporation ("TAC"), CAL's parent, adding TAC's own promise that CAL would perform (the "Side Letter"). This agreement with TAC provided:

> 3. TAC agrees that neither it nor any organization in which it or its successors or affiliates owns a controlling interest or exercises operational control shall conduct FAR Part 121 commercial flight operations unless such flying shall be performed by pilots on the CAL and TI System Seniority Lists. . . . App. 22.

The Side Letter was to "run concurrently with the Duration section of the CAL Basic Agreement, as modified" (para. 6) and also provided for arbitration of disputes that might arise under its terms. App. 22-23. The "Duration section" of the CAL Basic Agreement stated that the agreement " . . . shall continue in full force and effect until *September 30, 1984.*"

In September, 1983 CAL filed for bankruptcy under Chapter 11 (11 U.S.C. §1101). CAL began implementing new work rules inconsistent with the Basic Agreement immediately following its bankruptcy filing. (The bankruptcy court approved CAL's rejection of the Basic Agreement in June, 1984, but effective September 1983). The pilots, acting through ALPA, went on strike, and CAL responded by hiring non-Seniority List pilots, in violation of both the Basic Agreement and the TAC Side Letter. ALPA requested arbitration of the Side Letter in December 1983, but TAC refused.

In January, 1984, TAC filed a federal suit against ALPA seeking a declaration that it did not have to arbitrate the Side Letter claim. In August, 1985, while this suit was pending, CAL withdrew voluntary recognition of ALPA as the pilots' collective bargaining representative. Faced with these actions by CAL and TAC, petitioners, approximately 280 of the 1700 striking pilots, filed this suit in Texas state court based on TAC's breach of the Side Letter. Petitioners sought damages to compensate them for lost wages and benefits resulting from TAC's breach.

The state trial court granted TAC's motion for summary judgment on the merits and the state court of appeals affirmed. The court of appeals held that the bankruptcy rejection of the Basic Agreement caused termination of the Side Letter and also stated that petitioners' claims were barred by the Side Letter's arbitration clause:

> The summary judgment question of liability on this claim is answered by that provision that "any claim must be brought by arbitration." As a matter of law, this suit cannot be an available remedy for these third party beneficiaries, or for their agent for that matter.
>
> The summary judgment is correct because the "side letter" agreement has expired. "This Letter of Agreement shall run concurrently with the Duration section of the [Continental] Basic Agreement, as modified," says the side letter. The [Continental-ALPA] contracts cancellation by the bankruptcy court brought an end to the "side letter" rights of all concerned. By its own terms, it no longer is of any force or effect, and no recovery is available under it.

> . . . The contract has terminated, and had it not, the only recovery would be by *arbitration*. App. 7.

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS IMPORTANT TO THE ENFORCEMENT OF NATIONAL LABOR POLICY.

When an employer seeks to reject a collective bargaining agreement in the course of bankruptcy proceedings, the policies behind national labor laws and the bankruptcy statutes come into direct conflict. This Court has previously emphasized the need to accommodate both policies as much as possible: It has held that the standard for bankruptcy court rejection of a collective bargaining agreement is higher than the normal "business judgment" standard. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

In this case the employees, through their union, had previously obtained an important protection beyond the collective bargaining agreement: a contract with the employer's parent corporation obligating the parent to have the employer subsidiary (and all other subsidiaries in which it owned a controlling interest) operate under the terms of the existing collective bargaining agreement. When Continental filed for bankruptcy protection and rejected its labor contract, its pilots had a significant contract damage claim against the (at the time) non-bankrupt parent. Yet the state court below dismissed this claim on the basis of federal bankruptcy law without any statutory or policy justification.

The importance of avoiding further unwarranted restrictions on the employees' ability to even the playing field in anticipation of a subsidiary employer bankruptcy justifies review by this Court.

II. THE STATE COURT HOLDING THAT BANKRUPTCY REJECTION OF THE CAL BASIC AGREEMENT CANCELS THAT CONTRACT IS CONTRARY TO 11 U.S.C. §365(a) AND ITS CONSISTENT INTERPRETATION BY FEDERAL COURTS.

One key benefit of the 1982 Basic Agreement to the Continental pilots was job security. Because of Continental's prior history, its pilots also demanded and received TAC's separate promise that neither Continental nor any other TAC subsidiary would violate the pilot seniority or other provisions of the Basic Agreement. TAC guaranteed Continental's performance of the Basic Agreement by delivering its own separate promise that Continental would perform.

The state court held that Continental's rejection of the Basic Agreement in bankruptcy "canceled" and "terminated" that contract and thereby relieved TAC from its Side Letter obligations because the Side Letter was to run concurrently with the Basic Agreement. This holding conflicts with federal law regarding the effect of an executory contract's rejection in bankruptcy proceedings. After a thorough review of the historical and theoretical underpinnings of contract rejection under 11 U.S.C. §365(a), one bankruptcy court recently held:

> Rejection's effect is to . . . [give the nondebtor party a claim for money damages]. Rejection has absolutely no effect upon the contract's continued existence; the contract is not canceled, repudiated, rescinded, or in any other fashion terminated.

In re Drexel Burnham Lambert Group, Inc., 138 B.R. 687, 708 (Bkrtcy.S.D.N.Y. 1992) (quoting Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U.Colo.L.Rev. 1, 16 (1991)). *Accord, Texaco, Inc. v. Louisiana Land & Exploration Co.*, 136 B.R. 658, 663 (M.D.La. 1992).

The state court holding also ignores the modern functional approach to contract rejection issues in bankruptcy proceedings. The federal policies underlying the debtor's option to reject executory contracts are to benefit the bankruptcy estate and to avoid unfairness or preference among creditors. *In re Drexel Burnham Lambert Group, Inc., supra*, at 707-709. These policies do not include benefitting a nonbankrupt parent corporation by relieving it from its separate obligation to ensure or guarantee that the debtor will honor its labor contract or to respond in damages for a breach of that obligation. Even the bankrupt party is subject to a bankruptcy damage claim for the injury to the nondebtor party caused by the contract rejection. *Intern. Broth. of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986); *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). The state court's holding turns bankruptcy law on its head by giving TAC, the nonbankrupt parent, more protection than Continental itself received by virtue of its own bankruptcy.

III. THE STATE COURT'S RELIANCE ON THE SIDE LETTER'S ARBITRATION CLAUSE AS A BASIS FOR JUDGMENT AGAINST PETITIONERS ON THE MERITS IS PLAINLY WRONG AND DOES NOT CONSTITUTE AN ADEQUATE STATE GROUND FOR ITS DECISION.

At no time in this case has TAC ever asked for enforcement of the arbitration provision in the Side Letter. Although courts favor arbitration agreements, the right to arbitrate can be waived if a party proceeds with a court action without ever requesting an order to arbitrate. *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1039-40 (5th Cir. 1977), rehearing denied in part, granted in part, 559 F.2d 268, cert. den. 434 U.S. 1067; *Spain v. Houston Oilers, Inc.*, 593 S.W.2d 746 (Tex. Civ. App. – Houston [14th Dist.] 1979, no writ). TAC waived any arbitration rights by its decision to participate in this suit without raising the issue.

However, if the state court meant its conclusion regarding arbitration to be an alternate holding (as opposed to dicta), it committed an even more basic error. The remedy for disregarding an enforceable arbitration provision is to order the parties to arbitrate and stay or abate the suit pending the outcome of that arbitration. TEX. REV. CIV. STAT. ANN. art. 226, §§A, F; 9 U.S.C. §§3, 4. The decision below does just the opposite: By affirming a final judgment in favor of TAC, the court has conclusively barred any further proceedings, including arbitration.

The only way to make sense of the state court's handling of the arbitration issue is to construe this discussion as dictum rather than an alternate holding. Since

the court concluded that the TAC Side Letter was no longer in effect, it had no reason to order arbitration. However, if, as petitioners believe, the court erred in its interpretation of federal bankruptcy law, the decision cannot stand on the Alice in Wonderland reasoning that petitioners should lose their case because they must arbitrate it.

IV. THERE ARE NO OTHER GROUNDS SUFFICIENT TO JUSTIFY THE STATE COURT DECISION.

Although the state court of appeals based its decision solely on the effect of contract rejection under 11 U.S.C. §365 and the Side Letter's arbitration provision, respondent has argued other grounds to support their judgment in the courts below.

A. Petitioners Were Entitled to Sue on the Side Letter as Third Party Beneficiaries under State Law.

The Side Letter is an agreement between TAC and ALPA. ALPA was petitioners' union at the time the Side Letter was signed and therefore legally obligated to represent petitioners. Petitioners and other Continental pilots were the only possible beneficiaries of this contract; ALPA had no plausible interest in the agreement apart from the Continental pilots it represented. Petitioners are entitled to sue on the Side Letter as third party creditor beneficiaries because it was signed by ALPA exclusively for the pilots' benefit. Texas law does not require that petitioners be named in the contract in order for them to

bring suit. *Dairyland County Mutual Insurance Co. v. Childress*, 650 S.W.2d 770 (Tex. 1983); *Rudolph v. ABC Pest Control, Inc.*, 763 S.W.2d 930, 933-34 (Tex. App. – San Antonio 1989, writ den.)

TAC has argued below that the terms of the Side Letter only permit enforcement by ALPA. Paragraph 5 certainly permits ALPA to initiate enforcement (" . . . the Association may file a claim with TAC" App. 22), but no language states that only ALPA may enforce the agreement. In the absence of an explicit limitation on the rights of the pilot beneficiaries to enforce the agreement, Texas law permits them to do so. Members of labor unions and other unincorporated associations are entitled to enforce contracts made by the union or association for their benefit. *See Lone Star Cotton Mills v. Thomas*, 227 S.W.2d 300, 306 (Tex. Civ. App. – El Paso 1979, writ ref'd n.r.e.); *Ackermann v. Ackermann Schuetzen Verein*, 60 S.W. 366, 367-68 (Tex. Civ. App. 1900, no writ)

B. Petitioners' Claims Were not Waived in the Court-Approved Settlement of the CAL Strike.

The bankruptcy court handling Continental's bankruptcy approved a settlement of the pilot's strike in October 1985, after petitioners had filed this state court suit for damages under the TAC Side Letter. The bankruptcy court entered an Order and Award which gave the striking pilots three options. Pilots could (1) retain the right to be recalled in seniority order and waive all claims, (2) receive severance pay and waive all claims, or (3) retain their claims against Continental and TAC, with no severance pay or right to be recalled in seniority order. This

third option, elected by many of the petitioners, is summarized in a notice letter incorporated into the Order and Award:

> Each striking pilot retains the option of declining to waive his claims in the claims resolution process established by the Order and Award. As set forth at Sec. III.B.3 "Individual Claims" (p. 21) of the Order and Award, *such a pilot will retain all of his bankruptcy claims, and any other claims against Continental, its employees and affiliates;* but ALPA is not permitted to provide any support or assistance, direct or indirect, in the prosecution of such claims; any power of attorney previously granted to Cohen, Weiss & Simon is revoked. (Emphasis added.)

At the same time, the Order and Award provided that ALPA and TAC would dismiss their suit over the Side Letter and that ALPA would waive claims arising under the Side Letter. TAC argued below that ALPA's waiver of its claims under the Side Letter precludes petitioners from asserting any claims under that agreement.

The essence of the settlement was individual pilot choice. Rather than trying to impose a single resolution for all the Continental pilots, ALPA and Continental proposed a strike settlement that allowed the pilots either to keep their damage claims against Continental and TAC, or trade those claims for preferential recall or severance benefits. Petitioners had state court suits against TAC on the Side Letter pending at the time the settlement was made and approved by the bankruptcy court. In this context it is unreasonable to expand ALPA's waiver of rights against TAC to include waiver of all pilots' beneficiary rights under the Side Letter. The only viable claim petitioners got under Option 3 (since Continental was in

bankruptcy) was preservation of their claims as beneficiaries of the Side Letter against TAC. To say that this single benefit was simultaneously conferred and withdrawn would make Option 3 under the court-approved settlement a deceptive trap for pilots who relied on the language that they would retain their claims against Continental's affiliates. A more reasonable interpretation is that ALPA waived only its right to pursue the Side Letter claim in its own name and with its own participation, *but that petitioners who chose Option 3 retained the right to continue their third party beneficiary claims that had already been asserted in this state court suit.*

TAC has previously cited *O'Neill v. Texas Air Corporation*, No. 89-2455, 1990 U.S. App. LEXIS 6297 (5th Cir. April 13, 1990) (unpublished), in support of its waiver argument. In *O'Neill* the Fifth Circuit held that ALPA had the exclusive right to enforce the TAC side letter and that the O'Neill pilots' claims under the Side Letter were not preserved by the court-approved settlement. This decision is both mistaken and also distinguishable in part. The Side Letter does not state that it may be enforced only by ALPA or that the pilot beneficiaries have no enforcement rights. Petitioners' right to enforce the Side Letter is governed by Texas third party beneficiary law, and Texas law recognizes that members of unions or other unincorporated associations may enforce agreements made for the members' benefit.

The *O'Neill* case is also distinguishable because the Fifth Circuit determined that the O'Neill group of pilots had not asserted or threatened any claims under the Side Letter as of October 31, 1985, the date of the settlement. The court relied on this fact in concluding that the settlement did not preserve claims of the O'Neill group under

the Side Letter and that those pilots were estopped to deny ALPA's authority to settle the O'Neill group's claims. *However, petitioners filed this suit for damages against TAC under the Side Letter on September 23, 1985 – prior to the ALPA settlement.*

C. Petitioners' Damage Claims Against TAC Are Not Barred by Their Participation in the Strike Against CAL.

TAC argued below that petitioners have no damage claims because they chose not to work for Continental after it breached and repudiated the collective bargaining agreement, citing *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), and various NLRB cases. All of these cases involve the NLRB's general policy of not awarding back pay against an employer for the periods his employees were on strike. These cases do not apply to petitioners' state law contract claims against TAC *(which has consistently denied that it was petitioners' employer or a carrier subject to the Railway Labor Act).*

Petitioners' claims may be subject to the general contract defense of failure to mitigate damages. *See Lone Star Steel Co. v. Wahl,* 636 S.W.2d 217 (Tex. App. – Texarkana 1982, no writ). However, that defense was never considered by the court below. Mitigation relates to the amount of damages rather than liability. TAC's breach of the Side Letter excused further performance by petitioners. Their decision not to continue working for Continental at a fraction of their contract wage might or might not impact the amount of their damages, but it is immaterial to TAC's liability and to the decision below.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari and, upon review, reverse the decision of the state court of appeals and remand this case to said court for further proceedings consistent with the decision of this Court.

Respectfully submitted,

THOMAS W. REAVLEY
Counsel of Record

1301 West 25th Street
Suite 535
Austin, Texas 78705
(512) 476-2464

Counsel for Petitioners

APPENDIX A

Judgment Affirmed and Opinion filed March 14, 1991

(seal)

In The
Court of Appeals
For The
First District of Texas

NO. 01-90-00189-CV

CARL A. MAAS, et al, Appellants

V.

TEXAS AIR CORPORATION, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 85-53556

OPINION

Appellants, 280 current and former Continental Airlines, Inc. pilots ("the pilots"), appeal from a final take-nothing summary judgment in favor of appellee, Texas Air Corporation ("Texas Air"), the parent corporation of Continental Air Lines ("Continental"). We affirm.

In 1982, Continental and the pilots' agent, the Air Line Pilots' Association ("ALPA"), modified their 1979 collective bargaining agreement. In exchange for wage and benefit concessions, the pilots received job guarantees including, among other things:

1. All present or future flying performed in and for the service of Continental to be performed by pilots on the current Continental Pilot Seniority List.

2. This Agreement is binding upon any successors who shall employ the pilots on the Continental Pilot Seniority List regardless of the nature of the transfer of control, including bankruptcy.

ALPA wanted Texas Air to be a party to the Continental-ALPA modification. Because Texas Air was not an air carrier under the Railway Labor Act, and was not the employer of either Continental's pilots or ALPA members, Texas Air could not be a party to the modification. As a result, on the same date the modification was signed, ALPA and Texas Air signed a "side letter" in which Texas Air agreed "to provide reassurances that it is aware of and will abide by the Agreement made by Continental with the ALPA. In the "side letter," the parties agreed, among other things:

1. Texas Air acknowledged it was aware of the written agreement between Continental and the Pilots Association and agreed to abide by that agreement.

2. Flying to be performed by the pilots on the Continental Seniority Lists in accordance with the terms and conditions of the Continental-Pilots Association Basic Agreement.

3. In the event a dispute arises concerning this Agreement, the Pilots Association may file a claim with Texas Air. In the event the matter is not satisfactorily resolved, any claim is to be settled by arbitration.

One year later, in September 1983, Continental filed a petition under chapter 11 of the Bankruptcy Code, ceased domestic operations, implemented emergency work rules, which included unilateral changes in pay, benefits and conditions, and filed a motion to reject its collective bargaining agreement with the ALPA, which the bankruptcy court granted.

In response to Continental's bankruptcy, and the implementation of the emergency work rules, ALPA and its pilots began a strike against Continental. Continental then began using non-seniority list pilots for commercial flight operations.

Pursuant to paragraph five of the "side letter," the pilots sent a letter to Texas Air claiming violation of the "side letter" and demanded arbitration. Texas Air filed suit in the United States District Court for the Southern District of Texas seeking a declaration that ALPA's demand to invoke arbitration was null and void. ALPA counterclaimed, demanding arbitration. There is conflicting evidence concerning wither the court granted ALPA's request. In August 1985, Continental withdrew recognition of ALPA as the pilots' bargaining representative.

On September 23, 1985, the pilots brought this suit against Texas Air to recover damages for breach of the "side letter" agreement.

On October 31, 1985, after this lawsuit between the pilots and Texas Air was filed, ALPA and Continental settled the strike by way of an "Order and Award," which defined the rights of striking pilots to future employment by Continental. The Order and Award provided for one of three options to be selected by each pilot and any pilot

not selecting an option would automatically be relegated to option 3. Option 1 permitted pilots to return to work in seniority order and contained a waiver of all claims against Continental and its affiliates. Option 2 permitted pilots to resign and collect substantial severance benefits and also contained a waiver of all claims against Continental and its affiliates. Option 3 permitted pilots to return to work not in seniority order, at the end of the seniority list. The pilots selecting this option were not required to waive their claims against Continental and its affiliates. According to the pilots, the Order and Award did not purport to settle this litigation between the pilots and Texas Air.

Texas Air, in its first amended original answer to the pilots' original petition, asserted 12 affirmative defenses: lack of jurisdiction; res judicata; collateral estoppel; the agreement is null and void; the agreement provides no right to damages; the claim is barred by the statute of limitations; accord and satisfaction; discharge in bankruptcy; waiver; pilots received payment; release; no agreement with individual pilots; and pilots have no standing. The latter two defenses were not verified as required by TEX. R. CIV. P. 93(1)(2).

On August 26, 1988, pursuant to TEX. R. CIV. P. 166a, the pilots moved for summary judgment on the issue of liability and requested, pursuant to TEX. R. CIV. P. 166a(d), a separate trial on the issue of damages. The pilots claim their summary judgment evidence, affidavits and exhibits, show that a valid agreement between Texas Air and ALPA was entered into on August 18, 1982, Texas Air breached that agreement, and the pilots incurred actual damages.

On October 31, 1989, pursuant to Tex. R. Civ. P. 166a(b), Texas Air moved for summary judgment, setting forth the following grounds: the pilots' claims are barred by ALPA's agreement to settle and waive all claims under the "side letter;" the pilots may not recover any damages under the "side letter;" the "side letter" terminated as of the date of Continental's bankruptcy filing.

On January 10, 1990, the trial court granted Texas Air's motion for summary judgment and denied all the pilots' claims.

When both parties move for summary judgment, each party must carry his own burden as movant. *James v. Hitchcock Indep. School Dist.*, 742 S.W.2d 701, 703 (Tex. App. – Houston [1st Dist.] 1987, writ denied). In addition, the court may consider all the summary judgment evidence in deciding whether to grant either motion. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 S.W.2d 318, 319 (Tex. App. – Dallas 1989, writ denied). The court can rely on one party's evidence to supply missing proof in the other party's motion. *Seaman v. Seaman*, 686 S.W.2d 206, 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e). But, the court must indulge all reasonable inferences and resolve all doubts in favor of the losing party. *University of Texas v. Big Train Carpet*, 739 S.W.2d 792 (Tex. 1987). Under rule 166a of the Texas Rules of Civil Procedure, summary judgment may be rendered only if the pleadings, depositions, admissions and affidavits show (1) that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

As the plaintiff/movant, the pilots had the burden to show they were entitled to prevail on each element of their cause of action as a matter of law. Texas Air, as defendant/movant, had the burden to establish as a matter of law that there was no genuine issue of fact as to one or more of the essential elements of the pilots' cause of action. *Dallas County Appraisal Dist.*, 766 S.W.2d at 320. A fact issue is presented when conflicting inferences may be drawn from uncontroverted summary judgment proof. *Id.*

The side letter is the basis of this suit and its terms are controlling of it. The parties to it are ALPA and Texas Air; they are the designated, named parties, and the expressed benefits and obligations are assigned to them in written terms. In fact, and by federal statue, ALPA was the representative of the Continental pilots in negotiating the "side letter." The pilots in this suit seek recovery as third-party beneficiaries.

Terms of the side letter mandate affirmance of the granting of the Texas Air motion for summary judgment. By its terms it has expired, and under it only arbitration is a remedy.

This suit seeks to recover damages for breach of the "side letter." Paragraph 5 of the Letter of Agreement reads as follows:

> In the event a dispute arises concerning this agreement, the Association may file a claim with [Texas Air]. [Texas Air] shall answer the claim in writing within 10 days following receipt of the claim. In the event the matter is not satisfactorily resolved, *any controversy or claim arising out of or relating to this agreement* shall be settled

> by arbitration in accordance with the United States Arbitration Act. 9 U.S.C. Section 1.

(Emphasis added.)

The summary judgment question of liability on this claim is answered by that provision that "any claim must be brought by arbitration." As a matter of law, this suit cannot be an available remedy for these third party beneficiaries, or for their agent for that matter.

The summary judgment is correct because the "side letter" agreement has expired. "This Letter of Agreement shall run concurrently with the Duration section of the [Continental] Basic Agreement, as modified," says the side letter. The [Continental-ALPA] contracts cancellation by the bankruptcy court brought an end to the "side letter" rights of all concerned. By its own terms, it no longer is of any force or effect, and no recovery is available under it.

We need not look to third party rights or individual rights of those who have "withdrawn" from ALPA, because recovery is not possible by the very terms of the contract on which suit is brought. The contract has terminated, and had it not, the only recovery would be by arbitration.

The judgment of the trial court is affirmed.

/s/ Justice (Ret.) Stephen F. Preslar[1]

Former Appellate Justice Price[2] also sitting.

Chief Justice Evans not participating.
Do not publish. TEX. R. CIV. App. P. 90

Judgment rendered and opinion delivered Mar. 14, 1991

True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

---

[1] Hon. Stephen F. Preslar, Chief Justice Retired, Eighth District of Texas at El Paso, sitting by assignment.

[2] Hon. Frank C. Price, justice, former appellate, First District of Texas at Houston, sitting by assignment.

APPENDIX B

Court of Appeals

First Supreme Judicial District

ORDER

CARL A. MAAS, ET AL, APPELLANT

VS.

TEXAS AIR CORPORATION, APPELLEE

01-90-00189-CV

On this day came on to be considered Appellant's motion for rehearing. And such is hereby **OVERRULED.**

It is so ordered.

PER CURIAM

Panel consisting of Justice Stephen F. Preslar and Justice Frank C. Price.

Order entered April 25, 1991.

Kathryn Cox, Clerk of the Court

APPENDIX C

Court of Appeals
First Supreme Judicial District

ORDER

CARL A. MAAS, ET AL, APPELLANT

VS.

TEXAS AIR CORPORATION, APPELLEE

01-90-00189-CV

On this day came on to be considered Appellant's motion for en banc reconsideration. And such is hereby **DENIED.**

It is so ordered.

PER CURIAM

EN BANC

Order entered April 25, 1991.

Kathryn Cox, Clerk of the Court

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

CONTINENTAL AIRLINES, INC., ET AL., Debtors.	Case Nos. 90-932 through 90-984
CARL A. MAAS, ET AL., Movants, v. CONTINENTAL AIRLINES HOLDINGS, INC., Respondent.	M-92-118

STIPULATION AND ORDER

IT IS HEREBY STIPULATED between Carl A. Maas, et al. ("Movants") and Continental Airlines Holdings, Inc. ("Respondent") by and through their respective, undersigned counsel, as follows:

WHEREAS Movants are two hundred eighty current and former Continental Airlines pilots; and

WHEREAS Movants currently have an Application for Writ of Error pending in the Supreme Court of the State of Texas styled *Carl A. Maas, et al. v. Texas Air Corporation*, No. D-1168; and

WHEREAS Movants have filed in this Court a Motion for Order Granting Relief from Automatic Stay (M-92-118), requesting that the Automatic Stay of 11 U.S.C. § 362(a) ("stay") be modified in order to allow

Movants to pursue their Application for Writ of Error in the Texas Supreme Court; and

WHEREAS respondent has agreed to a modification of the Stay to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of the State of Texas as well as with proceedings in the appropriate Texas lower appellate court, in the event the Texas Supreme Court remands the case to such appellate court;

IT IS HEREBY AGREED this ___ day of ___, 1992, that the Automatic Stay under 11 U.S.C. Section 362(a) be modified to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of Texas so as to allow the Texas Supreme Court, or the appropriate lower appellate court, on remand, if applicable, to reach a determination as to the issues on appeal raised in the Application for Writ of Error in *Carl A. Maas, et al. v. Texas Air Corporation,* No. D-1168; and

IT IS FURTHER AGREED that Movants shall take no further action at the trial level in *Carl A. Maas, et al. v. Texas Air Corporation,* C.A. No. 85-53556 without first obtaining additional relief from the automatic stay from this Court.

JACOBS & CRUMPLAR, P.A.
/s/ Douglas B. Canfield
Douglas B. Canfield
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899
(302) 656-5445
Attorney for Movants
Date: ___

MORRIS, NICHOLS, ARSHT & TUNNELL
/s/ Luke W. Mette
Luke W. Mette
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorney for Respondent
Date: 6/5/92

SO ORDERED THIS 8th day of June, 1992.

/s/ Helen S. Balick
Helen S. Balick
United States Bankruptcy Judge

APPENDIX E

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 4, 1992

Mr. Tom F. Coleman
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Thomas Lee Bartlett
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Russell H. McMains
Law Offices of
Russell H. McMains, Jr.
P.O. Box 2846
2600 One Shoreline Plaza
Corpus Christi, TX 78403

Mr. Richard P. Keeton
Mr. Solace H. Kirkland
Mayor Day Caldwell
& Keeton, L.L.P.
700 Louisiana
Suite 1900
Houston, TX 77002

Mr. Tom W. Reavley
1301 West 25th Street
Suite 525
Austin, TX 78705

Mr. David L. Monroe
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Richard H. Anderson
2929 Allen Parkway,
Suite 1466
Houston, TX 77019

Mr. Gary C. Miller
Mayor, Day, Caldwell
& Keeton, L.L.P.
1900 NCNB Center
700 Louisiana
Houston, TX 77002

RE: Case No. D-1168
Style: CARL A. MAAS ET AL.
v. TEXAS AIR CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Tencha Damian
Tencha Damian, Deputy

APPENDIX F

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 9, 1992

Mr. Tom F. Coleman
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Tom W. Reavley
1301 West 25th Street
Suite 525
Austin, TX 78705

Mr. Thomas Lee Bartlett
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

RE: Case No. D-1168

Style: CARL A. MAAS ET AL.
v. TEXAS AIR CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK
BY: /s/ Tencha Damian
Tencha Damian, Deputy

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: Continental Airlines, Inc., et al.	:	Case No. 90-932-90-984
Debtors.	:	Jointly Administered Under Case No. 90-932
CARL A. MAAS, et al.,	:	
Movants,	:	MOTION NO: 92-118
v.	:	
CONTINENTAL AIRLINES HOLDINGS, INC.,	:	
Respondent.	:	

STIPULATION AND ORDER

IT IS HEREBY STIPULATED between Carl A. Maas, et al. ("Movants") and Continental Airlines Holdings, Inc., ("Respondent") by and through their respective counsel, as follows:

WHEREAS Movants previously had an Application for Writ of Error pending in the Supreme Court of the State of Texas, styled *Carl A. Maas, et al. v. Texas Air Corporation,* No. D-1168; and

WHEREAS Movants had filed in this Court a Motion for Order Granting Relief From Automatic Stay (M-92-118) requesting that the Automatic Stay of 11 U.S.C. § 362(a) ("Stay") be modified in order for Movants to pursue their Application for Writ of Error in the Texas Supreme Court; and

WHEREAS Respondent had agreed to a modification of the stay to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of the State of Texas as well as with proceedings in the appropriate Texas lower appellate court, in the event the Texas Supreme Court remanded the case to such appellate court; and

WHEREAS the parties had entered into a Stipulation and Order setting forth the agreement reached by the parties, regarding the modification of the Stay, which Stipulation and Order was approved by The Honorable Helen S. Balick, United States Bankruptcy Judge on June 8, 1992; and

WHEREAS the Supreme Court of Texas has denied Movants' Application for Writ of Error, and on November 19, 1992, denied Movants' Motion for Rehearing on the Application for Writ of Error; and

WHEREAS Movants wish to file a Petition for a Writ of Certiorari to the Supreme Court of the United States, seeking review of the Order of Supreme Court of Texas denying Movants' Application for Writ of Error; and

WHEREAS Movants are prohibited from proceeding with filing their Petition for Writ of Certiorari due to the operation of the Automatic Stay of 11 U.S.C. § 362(a); and

WHEREAS Movants wish to have a further modification of the Automatic Stay, to allow them to proceed with filing a Petition for Writ of Certiorari to the Supreme Court of the United States; and

WHEREAS Respondent has agreed to a modification of the Stay to allow Movants to proceed with their Petition for Writ of Certiorari in the Supreme Court of the United States as well as with proceedings in the appropriate Texas appellate courts, in the event that the Supreme Court of the United States remands the case to such appellate courts;

IT IS HEREBY AGREED this ___ day of ___, 1993 that the Automatic Stay under 11 U.S.C. § 362(a) be modified to allow Movants to proceed with their Petition for a Writ of Certiorari in the Supreme Court of the United States, so as to allow the Supreme Court, or the appropriate lower appellate courts, on remand, if applicable, to reach a determination as to the issues on appeal raised in *Carl A. Maas, et al. v. Texas Air Corporation*, No. D-1168; and

IT IS FURTHER AGREED that Movants shall take no further action at the trial level in *Carl A. Maas, et al. v. Texas Air Corporation*, C.A. No. 85-53556 without first obtaining additional relief from the automatic stay from this Court.

JACOBS & CRUMPLAR, P.A.

By:
/s/ Douglas B. Canfield
Douglas B. Canfield
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899
(302) 656-5445
Attorney for Movants
Date: 3-25-93

MORRIS, NICHOLS, ARSHT & TUNNEL

By:
/s/ Luke W. Mette
Luke W. Mette
1201 N. Market St.
P.O. Box 1347
Wilmington, DE 19899
(302) 429-9200
Attorney for Respondent
Date: 3/25/93

SO ORDERED THIS 26th day of March, 1993.

/s/ Helen S. Balick
HELEN S. BALICK
United States
Bankruptcy Judge

APPENDIX H

Letter of
Agreement Between
Texas Air Corporation
and the
Air Line Pilots Association
International

WHEREAS, Texas Air Corporation (TAC) agrees to provide reassurances that it is aware of and will abide by the Agreements made by Continental Air Lines, Inc. (CAL) with the Air Line Pilots Association, International (ALPA) in connection with the Prosperity Plan and in connection with the corporate reorganization involving Continental, Texas International Airlines, Inc. (TI) and the proposed Continental Air Corporation (CAC).

Now, therefore, the parties hereby agree as follows:

1. TAC acknowledges that it is aware of the written Agreements, including the Fence Agreement, made by CAL with ALPA in connection with the Prosperity Plan with CAL, TI and ALPA in connection with the corporate reorganization involving CAL, TI, and CAC and will abide by such agreements.

2. TAC agrees that neither TAC nor any organization in which it or its successors or affiliates owns a controlling interest or exercise operational control will transfer aircraft operated by CAL, TI, or CAC, including leasing or interchange arrangements with or to a new or existing FAR Part 121 (other than CAL, TI or CAC) carrier with respect to which TAC or its successors or affiliates owns a controlling interest or exercises operational control.

3. TAC agrees that neither it nor any organization in which it or its successors or affiliates owns a controlling interest or exercises operational control shall conduct FAR Part 121 commercial flight operations unless such flying shall be performed by pilots on the CAL and TI System Seniority Lists (or a combined CAL-TI System Seniority List) in accordance with the terms and conditions of the CAL and TI Basic Agreements, as modified, or the Combined Agreement. This paragraph shall not apply to New York Air, Inc.

4. ALPA acknowledges that TAC has taken the position that TAC is not a carrier subject to the Railway Labor Act; TAC acknowledges ALPA's position to the contrary. This Agreement shall be without prejudice to the position of either party on this issue. In addition, this Agreement shall be without prejudice to the position of the parties with respect to ALPA's System Board Submission No. DAL-61-80 and Air Line Pilots Association, International v. Texas International Airlines, Inc., Civil Action No. H-81-2200 (U.S.D.C., N. D. Texas).

5. In the event a dispute arises concerning this Agreement, the Association may file a claim with TAC. TAC shall answer the claim in writing within 10 days following receipt of the claim. In the event the matter is not satisfactorily resolved, any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the United States Arbitration Act, 9 U.S.C. Section 1, *et seq.*, by one arbitrator to be selected by the alternate striking method from a panel of three names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration

Association upon request of the Association within 30 days following receipt of TAC's response, or in the absence of a timely response by TAC within 60 days of the filing of this claim. Said arbitration shall be conducted in accordance with the rules, than obtaining, of said Association. The dispute shall be heard within 45 days following the submission of the dispute to the American Arbitration Association.

6. This Letter of Agreement shall run concurrently with the Duration section of the CAL Basic Agreement, as modified.

IN WITNESS WHEREOF, the parties have signed this Agreement this 18 day of Aug, 1982.

TEXAS AIR CORPORATION

BY /s/ Francisco A. Lorenzo
Francisco A. Lorenzo,
President

AIR LINE PILOTS ASSOCIATION INTERNATIONAL

BY: /s/ J. J. O'Donnell
J. J. O'Donnell,
President

Witness:

/s/ L. A. Baxter
L. A. Baxter, Chairman
Continental Airlines MEC

Witness:

/s/ Gary L. Casey

Witness:

/s/ Louis J. Colombo

Witness:

/s/ Illegible

Witness:

/s/ Illegible

Witness:

/s/ J. McCarthney
J. McCarthney

Witness:

/s/ _____
T. Mourning

Witness:

/s/ _____
N. Miller

Witness:

/s/ R. Waters
R. Waters, Chairman
Texas International Airlines MEC